Vet. App. No. 15-2815

IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS

EMERSON E. MARTIN,
Appellant,

v.

ROBERT A. MCDONALD,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

LEIGH A. BRADLEY
General Counsel

MARY ANN FLYNN
Chief Counsel

THOMAS E. SULLIVAN
Deputy Chief Counsel (027F)

SARAH W. FUSINA
Senior Appellate Attorney
Office of the General Counsel (027I)
U.S. Dept. of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-7139

Attorneys for Appellee

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	)	
Appellee.	)	

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

ISSUES PRESENTED

Whether the Court should affirm the Board of Veterans' Appeals' (Board), May 29, 2015, decision that denied entitlement to an evaluation in excess of 20 percent for a service-connected lumbosacral strain, where the Board's findings are plausibly based on the evidence of record and supported by Department of Veterans Affairs (VA) statutes and regulations and current case law, as well as an adequate statement of reasons or bases.

STATEMENT OF THE CASE

A. JURISDICTIONAL STATEMENT

The Court has exclusive jurisdiction to review the final decisions of the Board under 38 U.S.C. § 7252(a).

B. NATURE OF THE CASE

On May 29, 2015, the Board issued a decision denying entitlement to an evaluation in excess of 20 percent for a service-connected lumbosacral strain.

Appellant does not challenge the Board's denial of an evaluation in excess of 10 percent for post arthroscopic surgery of the right knee with mild degenerative changes based on limitation of motion, instability, or recurrent subluxation, nor does he challenge the Board's grant of a separate evaluation of 10 percent, but no higher, for post arthroscopic surgery of the right knee with mild degenerative changes based on removal of the semilunar cartilage that is symptomatic. *See Pederson v. McDonald,* 27 Vet.App. 276, 283 (2015) (en banc) (stating that "this Court, like other courts, will generally decline to exercise its authority to address an issue not raised by an appellant in his or her opening brief"); *Cacciola v. Gibson*, 27 Vet.App. 45, 47 (2014) (holding that when Appellant expressly abandons an appealed issue or declines to present arguments as to that issue, Appellant relinquishes the right to judicial review of that issue and the Court will not decide it); *Grivois v. Brown*, 6 Vet.App. 136, 138 (1994) (holding that issues or claims not argued on appeal are considered abandoned); *see also Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) (holding that the Court is not permitted to disturb favorable findings made by the Board).

Finally, the Board remanded the issue of entitlement to a total disability rating based on individual unemployability (TDIU). Therefore, the Court does not

have jurisdiction over that issue. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (A Board remand "does not represent a final decision over which this Court has jurisdiction").

A timely appeal with respect to the Board's denial of an increased rating for a lumbosacral strain was filed on July 27, 2015.

C. STATEMENT OF RELEVANT FACTS

Because Appellant has limited his allegations on appeal to his lumbosacral strain, the Secretary will focus his response and recitation of facts accordingly.

Mr. Emerson E. Martin (hereinafter "Appellant") served in the United States Army from April 29, 1981, to March 1, 1990. [Record (R.) at 85].

Service connection for a lumbosacral sprain was first granted in March 1990. [R. at 1573-75]. Years later, Appellant requested an increased rating in March 2003, [R. at 1355], and a June 2, 2003, rating decision granted an increased rating from 10 percent to 20 percent, effective March 28, 2003, for Appellant's lumbosacral strain. [R. at 1336 (1330-39)]. Appellant submitted another claim for an increased rating for his back condition on August 2, 2005. [R. at 1326]. Forward flexion was noted to be 90 degrees in a September 2005 VA examination. [R. at 1308]. As a result, a January 3, 2006, rating decision denied an increased evaluation for Appellant's lumbosacral strain, currently evaluated at 20 percent disabling. [R. at 1260 (1258-66)]. Appellant submitted a notice of disagreement on October 12, 2006. [R. at 1198].

Subsequently, Appellant was afforded an examination on April 4, 2007,

which noted forward flexion to 90 degrees that was unchanged after repetitive testing. [R. at 1188 (1187-89)]. A May 17, 2007, statement of the case continued to deny Appellant's claims. [R. at 1144-58]. Appellant appealed to the Board on May 30, 2007. [R. at 1141]. The Board issued a decision on January 31, 2011, remanding Appellant's lumbosacral strain claim because he had alleged that the severity of his disability had increased since the 2007 examination; therefore, the Board found that remand was warranted for a contemporaneous VA examination to ascertain the current nature and severity of Appellant's disability. [R. at 1065 (1061-70)]. This examination was provided on February 14, 2011. [R. at 1927-29]. Appellant described flare-ups with walking and standing, and the examiner found forward flexion of 70 degrees with pain. [R. at 1927]. However, the examiner concluded that while Appellant may have increased pain and loss of motion after activity, addressing more specifics would be mere speculation. [R. at 1928].

The Board issued a decision on June 3, 2013, denying entitlement to an evaluation in excess of 20 percent for Appellant's lumbosacral strain. [R. at 748 (732-50)]. The parties entered into a joint motion for remand on March 2014, agreeing that the February 2011 examination did not adequately address Appellant's functional limitations during flare-ups. [R. at 700 (698-707)]. The Court's order was entered on March 20, 2014. [R. at 697]. On September 18, 2014, the Board issued a decision ordering a new examination because the February 2011 examination did not adequately address the extent to which pain

could limit Appellant's functional ability during flare-ups. [R. at 679 (676-81)].

Thereby, a VA back examination was provided on December 30, 2014. [R. at 112-117 (112-23)]. Appellant reported flare-ups that make his back stiff and less mobile. [R. at 113]. Upon examination, Appellant's forward flexion was to 85 degrees with no pain noted during the examination. *Id*. Repetitive use generated no additional loss of function or range of motion. *Id*. Although Appellant was not experiencing a flare-up at the time of the examination, based on Appellant's statements describing functional loss during flare-ups, the examiner was able to note that with pain during flare-ups, Appellant's forward flexion would be limited to 60 degrees. [R. at 114]. Then, a supplemental statement of the case was issued on February 19, 2015, continuing to deny Appellant's claim. [R. at 36-47].

The Board issued the decision on appeal on May 29, 2015. [R. at 1-27]. First, the Board found that the December 2014 examination substantially complied with the September 2014 remand instructions, and was thorough and adequate for rating purposes. [R. at 5-6]. The Board reviewed the evidence of record, but found that at no point did the record demonstrate forward flexion of the thoracolumbar spine to 30 degrees or less, or favorable ankylosis of the entire thoracolumbar spine. [R. at 11-13]. The Board noted that, at worst, Appellant's forward flexion of his lumbar spine was limited to 60 degrees during flare-ups after consideration of pain. [R. at 13]. Furthermore, there was no additional functional impairment or loss due to flare-ups or pain. [R. at 14].

Therefore, a rating in excess of 20 percent was not warranted. *Id*.

With regard to referral for extraschedular consideration, the Board found that the rating criteria reasonably describes and compensates Appellant's symptomatology. [R. at 20-21]. The Board determined that Appellant had not submitted evidence indicating his disabilities are exceptional or unusual, and that his musculoskeletal symptoms such as pain, flare-ups, and reduced motion, are already clearly contemplated in the rating schedule. [R. at 21]. Because Appellant's disability is reasonably encompassed by the rating schedule, the Board found that it was not necessary to address whether his disabilities caused marked interference with employment. *Id*. Moreover, the Board discussed whether there was a combined effect of multiple conditions that caused an exceptional circumstance that the individual evaluations failed to capture, but found that was not the case for Appellant. Specifically, the Board noted that there are no additional disabilities or symptomatology that have not already been attributed to and compensated by a specific service-connected condition. *Id*. As a result, referral for extraschedular consideration based on a combined effect of multiple service-connected conditions was also not warranted. *Id*.

Appellant filed a timely appeal on July 27, 2015.

SUMMARY OF THE ARGUMENT

The Court should affirm the Board's May 29, 2015, decision because Appellant has failed to demonstrate prejudicial error in the Board's denial of an increased rating for his lumbosacral strain. The December 2014 examination is

adequate, and the Board provided an adequate statement of reasons or bases both for denying a schedular rating in excess of 20 percent and for denying referral for extraschedular consideration.

ARGUMENT

A. The December 2014 examination is adequate and the Board provided an adequate statement of reasons or bases for denying a schedular rating in excess of 20 percent for Appellant's lumbar spine disability.

Appellant challenges the adequacy of the April 2007, February 2011, and December 2014 examinations, as well as the Board's reliance on them. App. Brf. at 7-11. Initially, the Secretary notes that the April 2007 examination was never found to be inadequate; rather, the Board remanded Appellant's claim in January 2011 so he could be provided with a contemporaneous examination to evaluate the current severity of his lumbar spine disability. [R. at 1065]. Furthermore, while the February 2011 examination was found to be inadequate for rating purposes on its own because it did not adequately address Appellant's functional limitations during flare-ups, [*see* R. at 700, 679], at no point were the other findings of the February 2011 examination invalidated.

Therefore, the Board's reference to the April 2007 and February 2011 examinations to support its finding that Appellant's range of motion of his lumbar spine was only ever limited to 60 degrees of forward flexion at worst, [R. at 11-13], was not in error. *See Monzingo v. Shinseki*, 26 Vet.App. 97, 107 (2012) (holding that "even if a medical opinion is inadequate to decide a claim, it does not necessarily follow that the opinion is entitled to absolutely no probative

weight," and also noting that "if an opinion is lacking in detail, then it may still be given some weight based on the amount of information and analysis that it does contain."); *see also Hogan v. Peake*, 544 F.3d 1295, 1298 (Fed. Cir. 2008) (holding that the Board is obligated to consider all pertinent medical and lay evidence).

Furthermore, the December 2014 examination is adequate, both when read as a whole on its own, and when read together with the other two evaluations. *See Acevedo v. Shinseki*, 25 Vet.App. 286, 294 (2012) (examination reports should be read as a whole, taking into consideration the history, tests and examinations, to determine adequacy); *Stefl v. Nicholson,* 21 Vet.App. 120, 123 (2007) (quoting *Ardison v. Brown,* 6 Vet.App. 405, 407 (1994)) (A medical opinion is adequate "where it is based on consideration of the Veteran's prior medical history and examinations and also describes the disability, if any, in sufficient detail so that the Board's evaluation of the claimed disability will be a fully informed one."). The December 2014 examiner clearly took into consideration Appellant's reports of flare-ups, which occur approximately three times a year and last for one week, and result in his back becoming stiff and less mobile. [R. at 113]. Appellant was not experiencing a flare-up at the time of the examination. His range of motion during the examination was 0 to 85 degrees forward flexion with no pain. *Id*.

Notably, the examiner went on to find that Appellant's statements of functional loss were supported by the examination and that pain, weakness, and

incoordination do limit Appellant's functional ability with flare-ups. [R. at 114]. Where there is medical evidence of flare-ups, an adequate examination must opine as to whether there is additional limitation of motion due to pain during flare-ups or additional functional loss as a result of repetitive use. *Mitchell v. Shinseki*, 25 Vet.App. 32, 43-44 (2011) (holding that, if feasible, the loss should be expressed in terms of range of motion); *Deluca v. Brown*, 8 Vet.App. 202, 206 (1995). The examiner fully complied with *Mitchell* and *DeLuca* by finding that during flare-ups, Appellant's flare-ups further limited his range of motion of forward flexion to 60 degrees. [R. at 114].

Contrary to Appellant's assertions, App. Brf. at 9-10, the December 2014 examiner did clearly note Appellant's flare-ups and also how the symptomatology from his flare-ups resulted in additional functional loss, even going so far as to express it in terms of range of motion. [R. at 14]; *see Monzingo*, 26 Vet.App. at 105-06 (noting that examination reports are adequate when they sufficiently inform the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion). Appellant's lumbar spine disability is rated under 38 C.F.R. § 4.71a, Diagnostic Code 5237, the General Rating Formula for Diseases and Injuries of the Spine. Under the general criteria, a 20 percent rating is warranted when forward flexion of the thoracolumbar spine is greater than 30 degrees, but not greater than 60 degrees. 38 C.F.R. § 4.71a. A 40 percent rating is only warranted if there is forward flexion of the thoracolumbar spine to 30 degrees or less, or favorable ankylosis of the entire thoracolumbar

spine. *Id*. Appellant has not alleged nor does the evidence demonstrate ankylosis. [R. at 13].

The Board further noted that at no point during the pendency of the claim was Appellant's forward flexion of the thoracolumbar spine 30 degrees or less. *Id*. Indeed, at worst, after functional loss due to flare-ups was taken into consideration, Appellant's forward flexion of the lumbar spine was only limited to 60 degrees, which is squarely encompassed by his current 20 percent disability rating. *Id*. Additionally, as the Board pointed out, Appellant actually explicitly denied any functional loss or functional impairment of the thoracolumbar spine regardless of repetitive use. [R. at 14, 113]. Therefore, Appellant's pain and flare-ups have already been taken into consideration and result in range of motion loss that is adequately compensated by his 20 percent rating. *See Thompson v. McDonald*, 815 F.3d 781, 785-86 (Fed. Cir. 2016) (reiterating that although 38 C.F.R. § 4.40 demonstrates that pain can cause functional loss, the ultimate rating is to be understood and completed in terms of the criteria and range of motion thresholds enumerated in 38 C.F.R. § 4.71a); *Mitchell*, 25 Vet.App. at 37, 43 (pain alone throughout the range of motion without a reduction in range of motion is not compensable); *see also Bethea v. Derwinski*, 2 Vet.App. 252, 254 (1992) (recognizing that the Court of Appeals for Veterans Claims is bound to follow the precedent of the U.S. Court of Appeals for the Federal Circuit and the Supreme Court of the United States).

The Board's determination that the December 2014 examination is adequate, thorough, and consistent with contemporaneous medical records is not clearly erroneous. [R. at 5-6]; *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) (whether an examination report is adequate is a finding of fact reviewed under the "clearly erroneous" standard of review); *Nolen v. Gober,* 14 Vet.App. 183, 184 (2000) (stating that the duty to assist involves factual findings). Moreover, the Board determination of the appropriate degree of disability under the rating code is a finding of fact subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); see *Smallwood v. Brown,* 10 Vet.App. 93, 97 (1997). Here, the Board's conclusion is plausible and supported by the evidence of record as well as an adequate statement of reasons or bases. *See* 38 U.S.C. 7104(d)(1); *Allday v. Brown,* 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski,* 1 Vet.App. 49, 56-57 (1990). Therefore, the Court should affirm the Board's decision. *See Gilbert*, 1 Vet.App. at 53 (in determining whether finding is clearly erroneous, "this Court is not permitted to substitute its judgment for that of the [Board] on issues of material fact; if there is a 'plausible basis' in the record for the factual determinations of the [Board] ... [the Court] cannot overturn them.").

B. The Board provided an adequate statement of reasons or bases that is supported by the evidence of record, for denying referral for extraschedular consideration for Appellant's lumber spine disability.

An extraschedular rating is appropriate where the case presents an exceptional or unusual disability picture with such related factors as marked interference with employment. 38 C.F.R. § 3.321(b). The award of an

extraschedular disability rating is the result of a claimant satisfying a three-step inquiry. *Thun v. Peake,* 22 Vet.App. 111, 115 (2008), *aff'd sub nom. Thun v. Shinseki,* 572 F.3d 1366 (Fed. Cir. 2009). The first step in the inquiry is to determine whether "the evidence before VA presents such an exceptional disability picture that the available schedular evaluations for that service-connected disability are inadequate." *Id.* If the Board decides that the first step of *Thun* is not satisfied, then it need not address the second step of *Thun* in order to determine that referral for extraschedular consideration is not warranted. *Yancy v. McDonald*, 27 Vet.App. 484, 494 (2016) (holding that if either of the first two elements of *Thun* is not met, then referral for extraschedular consideration is not appropriate).

Appellant points out that his disability is characterized by flare-ups, bed rest, inability to walk more than 50 yards or bend frequently, difficulty with standing or sitting for more than 30 or 20 minutes, respectively, and use of injections and physical therapy for pain. App. Brf. at 11. However, other than list these symptoms, Appellant has entirely failed to demonstrate how they make his disability exceptional or unusual as to render the rating schedule inadequate. *See Locklear v. Nicholson*, 20 Vet.App. 410, 416-17 (2006) (recognizing that terse or undeveloped arguments do not warrant detailed analysis by the Court and are considered waived); *Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) (requiring Appellant to plead the allegation of error with some particularity), *rev'd on other grounds sub nom Coker v. Peake*, 310 F.App'x 371 (Fed. Cir. 2008). In

fact, Appellant's pain with flare-ups, his limitation in motion such as the inability to walk long distances, bend frequently, stand or sit for long periods of time, are all contemplated in his current schedular rating, which has already taken into consideration his flare-ups, pain, and loss in range of motion. [*see* R. at 21 (the Board finding that musculoskeletal symptoms such as decreased range of motion, pain, and flare-ups are already contemplated in the General Rating Formula)].

Insofar as his therapy and injections are concerned, Appellant cites to a VA General Counsel opinion, but then fails to note how his medications have impacted his employment or life. *See Locklear*, *supra*; *Coker*, *supra*. Indeed, there is no evidence, nor has Appellant pointed to any in his brief, suggesting that his medications have any disabling side-effects or that they interfere with his employment.

Next, as to Appellant's allegation that the Board erred by failing to address his employment issues, App. Brf. at 15-16, the Board already determined that Appellant's disability picture was not exceptional or unusual. [R. at 21]. Therefore, because Appellant failed to satisfy step one of *Thun*, the Board correctly noted that it is not necessary to then consider whether Appellant's disabilities cause marked inference with employment or periodic hospitalizations. *Id*.; s*ee Yancy*, 27 Vet.App. at 494. As such, any error with respect to the Board's discussion of step two of *Thun* is harmless at best. *See* 38 U.S.C.

§ 7261(b)(2) (Court is required to "take due account of the rule of prejudicial error"); *Shinseki v. Sanders,* 556 U.S. 396, 406 (2009).

Similarly, Appellant's contention that the Board erred by remanding his claim of entitlement to TDIU, but not remanding his claim for extraschedular consideration under 38 C.F.R. § 3.321, App. Brf. at 17-18, is also unpersuasive. This Court has recognized that the regulatory provisions concerning employment and employability, 38 C.F.R. § 3.321(b)(1) and 38 C.F.R. § 4.16(a), have different purposes, requirements, and standards. *Thun*, 22 Vet.App. at 117; *Keller v. Brown*, 6 Vet.App. 157, 162 (1994) ("The effect of a service-connected disability appears to be measured differently for purposes of extra-schedular consideration under 38 C.F.R. § 3.321(b)(1)…and for purposes of a TDIU claim under 38 C.F.R. § 4.16(a)"); *Stanton v. Brown*, 5 Vet.App. 563, 564-70 (1993) (clarifying that the issue of an extraschedular rating is separate from the issue of a TDIU rating). Appellant cites to *Brambley v. Principi*, 17 Vet.App. 20 (2003), in support of his claim, but that case is distinguishable. The Board in *Brambley* found that the schedular criteria did not reasonably describe the claimant's disability and thus, moved onto the second prong of *Thun* to determine whether there is marked interference with employment. *Id*. at 22. Therefore, the Court in *Brambley* held that "it was premature for the Board to decline extraschedular consideration where the record was significantly incomplete in a number of relevant areas probative of the issue of employability." *Id*. at 24.

In contrast, in the instant case, the Board never needed to reach the second prong of *Thun* because the Board determined that the record does not show that Appellant's lumber spine disability is exceptional or unusual. [R. at 21]. As such, Appellant's assertion that a remand of TDIU necessarily warrants a remand of his § 3.321(b)(1) claim is not persuasive in this case when the Board clearly found that the first element of *Thun* was not satisfied. *See Yancy*, 27 Vet.App. at 494; *Sowers v. McDonald,* 27 Vet.App. 472, 478 (2016) ("The rating schedule must be deemed inadequate before extraschedular consideration is warranted."); *Brambley*, 17 Vet.App. at 24 (noting that the TDIU and § 3.321 analysis are not necessarily "inextricably intertwined"). Indeed, additional information regarding Appellant's employability would not have any impact on the determination of whether extraschedular referral was warranted under § 3.321(b)(1) because the Board already found the rating schedule to be adequate.

Finally, contrary to Appellant's arguments with regard to a collective impact, the Board did address Appellant's disabilities and consider whether there was a combined effect that warranted referral for extraschedular consideration. [R. at 21]; *Johnson v. McDonald,* 762 F.3d 1362, 1365 (Fed. Cir. 2014) ("The plain language of § 3.321(b)(1) provides for referral for extraschedular consideration based on the collective impact of multiple disabilities."); *see also Yancy*, 27 Vet.App. at 495 (holding that the Board must consider the collective impact of multiple service-connected disabilities whenever that issue is expressly

raised by the claimant or reasonably raised by the evidence of record). The Board noted that Appellant's symptoms were already contemplated and compensated by his current schedular ratings. [R. at 21]. Moreover, his overall disability picture did not create an exceptional circumstance where extraschedular consideration was necessary to compensate Appellant for a disability or symptoms that are attributable to the combined effects of multiple service-connected disabilities. *Id*. Appellant's citations in his brief as to being limited in his ability to walk, climb flights of stairs, or stand or sit for long periods of time do not demonstrate a combined effect that creates an exceptional or unusual disability picture that is not already compensated by Appellant's individual disability ratings. *See* App. Brf. at 13-14.

As such, Appellant's assertions herein amount to nothing more than a mere disagreement with how the Board has weighed the evidence. *See Madden v. Gober,* 125 F.3d 1477, 1481 (Fed. Cir. 1997) (observing that it is the Board's duty "to analyze the credibility and probative value of evidence"); *Owens v. Brown,* 7 Vet.App. 429, 433 (1995) (Board must weigh and assess evidence of record). The Board's determination that referral for extraschedular consideration is not warranted is plausible and supported by the evidence of record. 38 U.S.C. § 7261(a)(4); *Thun,* 22 Vet.App. at 115 (recognizing that the Court reviews the Board's determination of whether referral for extraschedular consideration is warranted under the "clearly erroneous" standard of review). Therefore, the

Court should affirm the Board's denial of referral for extraschedular consideration.

Appellant bears the burden of demonstrating error on appeal, but in this case, he has not established that the Board committed error warranting remand. *Sanders,* 556 U.S. at 406; *Hilkert v. West,* 12 Vet.App. 145, 151 (1999) (en banc) (appellant bears burden of demonstrating error on appeal), *aff'd per curiam* 232 F.3d 908 (Fed. Cir. 2000); *Marciniak v. Brown,* 10 Vet.App. 198, 201 (1997) (holding that the appellant bears the burden of demonstrating prejudice on appeal and that remand is unnecessary "[i]n the absence of demonstrated prejudice").

CONCLUSION

In light of the foregoing, Appellee, Robert A. McDonald, Secretary of Veterans Affairs, asks the Court to affirm the Board's May 29, 2015, decision.

Respectfully submitted,

LEIGH A. BRADLEY
General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Thomas E. Sullivan
THOMAS E. SULLIVAN
Deputy Chief Counsel (027F)

/s/ Sarah W. Fusina
SARAH W. FUSINA

Senior Appellate Attorney
Office of the General Counsel (027I)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-7139

Attorneys for the Appellee
Secretary of Veterans Affairs